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Supreme Court of the United States

OCTOBER TERM, 1941

No. 803

STEUART PURCELL, EDMUND H. BUDNITZ AND  
ARTHUR H. BRICE, CONSTITUTING THE PUB-  
LIC SERVICE COMMISSION OF MARYLAND,  
*et al.*, Appellants,

*vs.*

THE UNITED STATES OF AMERICA,  
THE CONFLUENCE AND OAKLAND RAILROAD  
COMPANY *et al.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE DISTRICT OF MARYLAND.

Memorandum in Behalf of Appellees, The Baltimore and  
Ohio Railroad Company and The Confluence and  
Oakland Railroad Company.

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Confluence and Oakland Railroad Company.*

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*et al.*, Appellants,

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## Memorandum in Behalf of Appellees, The Baltimore and Ohio Railroad Company and The Confluence and Oakland Railroad Company.

Counsel for The Baltimore and Ohio Railroad Company and The Confluence and Oakland Railroad Company, appellees herein, have been furnished with a copy of the brief which is being filed herein in behalf of the United States. To avoid duplication, we are not filing any brief in behalf of the Railroad Companies but desire to advise the Court in behalf of the Railroad Companies that we are fully in agreement with the position taken before the Court in the Government's brief, and wish to adopt as our own the argument therein contained.

So far as the railroads are concerned, their primary interest in this case has been, and is, that the measure of damages to be applied to recompense them for the taking of their property should be definitely established. The option given by them to the War Department to purchase for \$306,000 the part of the line affected by the abandonment proceedings was subject to

the approval by the Interstate Commerce Commission of the railroads' application for abandonment (R. 25). Whether that amount will need to be increased will depend upon the outcome of this case.

As appears from the Government's brief, the only question of practical significance in this case is whether the Commission should have authorized an abandonment without requiring a relocation of line. Before the railroads applied to the Commission for authority to abandon the existing line, the War Department had already determined that if the property could not be taken by purchase, it would be taken by condemnation (R. 25). When the matter came before it, the Commission did consider the question of whether it should require a relocation (R. 25-26, 28). As appears from the Commission's own report, the appellées' evidence showed that the cost of relocation would be from \$2,018,000 to \$2,519,000 (R. 25-26). Though the appellants offered evidence that the cost of such relocation would be \$800,000, their estimate of the cost of maintaining the relocated line was even higher than that of the appellees (R. 25-26). The Commission found that past system profits computed upon the basis claimed by the appellants were not sufficient to yield a reasonable return even on the sum of \$800,000, which the appellants claimed would be the cost of relocation, and that the return would be further reduced by increased operating costs (R. 28).

Though we do not believe this finding essential to the sustaining of the Commission's order, since under the statute there is no requirement that abandonment be conditioned upon a relocation and, in cases of this sort, the Commission only requires a relocation where, in view of all the factors involved, it would not otherwise grant the application for abandonment, it is pertinent in this connection that in only one of the five years, 1935-1939, inclusive, did The Baltimore and Ohio Railroad Company not have a deficit in net income, see Exhibit A, page four, Return to Questionnaire, original not printed but made a part of the record herein (R. 58). In this connection, this Court will also be interested in the facts recited in *In re Baltimore and Ohio Railroad Company*, 29 F. Supp. 608 (1939), (Cer. den., 309 U. S. 654, and application for rehearing denied, 309 U. S. 697) which,

we submit, are likewise a factor to be considered in determining the reasonableness of the Commission's approving the abandonment involved in this case without requiring a relocation. As appears from the opinion in the above case, The Baltimore and Ohio Railroad Company, due to an inability to meet its maturities and fixed charges, was forced in 1939 to seek relief therefrom in a proceeding under Chapter XV of the Federal Bankruptcy Act as amended. But, as appears from the opinion, that relief was merely "temporary" and under the readjustment plan which was effectuated in the proceeding, the fixed interest, payment of which was made contingent upon earnings, again becomes fixed after the lapse of the period provided for in such plan.

If the Commission had conditioned its approval of the abandonment upon a relocation, one result would be to saddle upon a system which has had difficulty meeting its fixed charges in the past, the burdensome cost of maintaining and operating an uneconomic line — and this would be true, even though the cost of relocating the line was added to the railroads' measure of damages.

Respectfully submitted,

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# SUPREME COURT OF THE UNITED STATES.

No. 803.—OCTOBER TERM, 1941.

Steuart Purcell, Edmund Budnitz and  
Arthur H. Brice, Constituting The  
Public Service Commission of Mary-  
land, and McCullough Coal Corpora-  
tion, a Maryland Corporation, Appel-  
lants,

vs.

The United States of America, The Con-  
fluence and Oakland Railroad Com-  
pany and The Baltimore and Ohio  
Railroad Company.

On Appeal from the  
District Court of the  
United States for the  
District of Maryland.

[March 2, 1942.]

Mr. Justice BLACK delivered the opinion of the Court.

A federal district court, composed of three judges in accordance with 28 U. S. C. § 47, dismissed the appellants' bill which prayed for the annulment of an order of the Interstate Commerce Commission. 41 F. Supp. 309. The order permitted the Confluence and Oakland Railroad Company, as owner, and the Baltimore and Ohio Railroad Company, as lessee, to abandon a railroad line approximately 20 miles long and to discontinue service entirely in the area now served: a semi-mountainous section along the Youghiogheny River between Confluence and Oakland Junction, Pennsylvania, and Kendall, Maryland. The appellants, who also appeared as protestants before the Interstate Commerce Commission, are the Public Service Commission of Maryland and the McCullough Coal Corporation, a coal mining company which alleges it will be forced out of business if railroad service is discontinued.

The application to the Commission for abandonment was not made because the line had been operating at a loss. On the contrary, the Commission concluded that there was no evidence that the line had theretofore been a burden on the Baltimore and Ohio system of which it was a part; or that a predictable decline in



the volume of traffic would make it one in the future, if it were allowed to continue in existence undisturbed. 244 I. C. C. 458; 247 I. C. C. 399, 401. But continued undisturbed existence would be an impossibility in view of a flood control project already begun by the War Department under authority of an Act of Congress. 52 Stat. 1215-1216. This project entails the construction of a dam which will create a reservoir covering an area in which twelve miles of the line are now located. It is conceded that unless a new connecting section is built, the sections of the line not to be inundated—a detached six mile segment above the dam, and a one mile segment connecting with the main line of the Baltimore and Ohio below it—would serve no practical purpose justifying continued operation.

The appellants do not challenge the statutory authority of the War Department to submerge the line as it proposes to do. Nor do they suggest that the Commission could or should take any action to deter completion of the project. Nevertheless, they contend that since "the sole reason for the abandonment was the flood control project, the application should have been denied forthwith by the Commission because of lack of jurisdiction to grant an abandonment on such ground." But under Section 1(18) of the Interstate Commerce Act the standard prescribed for the Commission in cases of this kind is whether "the present or future public convenience and necessity permit of such abandonment." 49 U. S. C. §1(18). It is difficult to imagine what consideration of present or future public convenience could reasonably impel the Commission to decline to authorize abandonment of a line admittedly doomed to be rendered inoperable regardless of what action the Commission might take. And the appellants suggest none. We must dismiss the appellants' contention on this point as without merit.<sup>1</sup>

The appellants make the further argument that even if the Commission did not err in permitting abandonment of the line

<sup>1</sup> Where projected inundation of a line made discontinuation of operation over it compulsory, the Commission has consistently given its authorization for abandonment. See *Los Angeles & S. L. R. Co. Abandonment*, 212 I. C. C. 597, 598: "It is apparent from the record that under the circumstances stated above the proposed abandonment is compulsory, and will not result in public inconvenience." In some such situations the Commission has attached the condition of relocation. *E. g.*, *St. Louis-S. F. Ry. Co. Trustees Abandonment*, 244 I. C. C. 485. In others, it has not. *E. g.*, *Southern Ry. Co. Abandonment*, 217 I. C. C. 764.

its order cannot stand because of the failure to impose a condition that substitute service be provided by relocating the line.<sup>2</sup> After hearing testimony on the probable cost of relocation and the probable cost of maintaining a relocated line, the Commission concluded that "considering the expenditure necessarily incident to that relocation and the increased costs of operating the line that will be caused thereby, . . . we are not justified by the public convenience and necessity in taking action herein that will require the relocation of the line." The appellants do not contest the Commission's finding, amply supported by evidence, that the relocated line would require increased operating expenses. If the Commission had based its conclusion on this finding alone, there would seem to be no adequate ground for setting its order aside in judicial proceedings. The Commission did consider relocation costs, however, and the appellants contend that this was an improper consideration which invalidates its order.

In making this attack on the order, the appellants contend that under the statute authorizing the War Department to construct flood control projects, the cost of relocation would have to be borne by the government rather than the railroad. Cost thus borne would not affect the financial condition of the railroad itself; the appellants urge, and therefore there could be no such weakening of the railroad's capital structure as would adversely affect the transportation system. Hence, the argument continues, in that balancing of the interests of those now served by the present line on the one hand, and the interests of the carrier and the transportation system on the other which a proper disposition of abandonment applications requires, *Colorado v. United States*, 271 U. S. 153, the former interests must prevail.

As the court below pointed out, however, "an uneconomic outlay of funds would not be in the interests of transportation even though the money be derived from the national government." This Court has recognized that operation of the national railway system without waste was one of the purposes the Transportation Act of 1920 was intended to further. *Texas v. United States*, 292 U. S. 522, 530; *Texas & Pac. Ry. v. Gulf, etc., Ry.*, 270 U. S. 266, 277. And a stated purpose of the Transportation

<sup>2</sup> The Commission is empowered to attach conditions by Section 1(20) of the Interstate Commerce Act which provides in part: "The commission may attach . . . such terms and conditions as in its judgment the public convenience and necessity may require." 49 U. S. C. § 1(20).

Act of 1940, in the light of which Congress prescribed that the "Act shall be administered and enforced" is "to promote . . . adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers." 54 Stat., 899. When materials and labor are devoted to the building of a line in an amount that cannot be justified in terms of the reasonably predictable revenues, there is ample ground to support a conclusion that the expenditures are wasteful whoever foots the bill. The fostering care of the railroad system intrusted to the Commission is not so circumscribed as to leave it without authority to pass on the economic advisability of relocation in a situation where someone other than the carrier provides the money. The weight to be given to cost of a relocated line as against the adverse effects upon those served by the abandoned line is a matter which the experience of the Commission qualifies it to decide. And under the statute, it is not a matter for judicial rededecision. Nor is there any indication in the Flood Control Act of 1938 that Congress desires to take away from the Commission any of the powers to make decisions of this kind which the Interstate Commerce Act had previously granted it.

The judgment of the court below is

*Affirmed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*